IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	CRIMINAL ACTION
	:	
v.	:	No. 95-220-02
	:	
EFRAIN GARCIA	:	
Defendant.	:	
	:	
	:	

MEMORANDUM & ORDER

YOHN, J. October ____, 2005

Defendant Efrain Garcia, a prisoner at Federal Correctional Institution - Schuylkill in Minersville, Pennsylvania, brings this *pro se* motion to modify his term of imprisonment pursuant to 28 U.S.C. § 3582(c)(2). Petitioner argues that his sentence should be reduced in light of an amendment to the United States Sentencing Guidelines ("U.S.S.G.") enacted after his sentencing. For the reasons set forth below, the motion will be granted.

I. BACKGROUND

On April 26, 1995, a grand jury returned a one hundred twelve count indictment charging Garcia,[1] in 36 counts, with participating in a large scale heroin and cocaine distribution organization operated by the defendant's father. On November 20, 1995, defendant pled guilty to thirty-four counts of the indictment[2], including: conspiracy to distribute cocaine and heroin, in violation of 21 U.S.C. § 846; possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1); and possession with intent to distribute cocaine near a school, in violation of

[1] The indictment also charged thirty-three other individuals with a variety of crimes.

[2] As part of the plea agreement, the government moved to dismiss counts eleven and thirteen of the indictment.

21 U.S.C. § 860. In a written plea agreement, Garcia stipulated that from 1984 to April 1995 he was involved in the distribution of 150 kilograms or more of cocaine or equivalent amounts of heroin.

At the April 3, 1996 sentencing, this court determined, and defendant agreed, that Garcia's narcotics offenses carried a base offense level of 38, pursuant to U.S.S.G. § 2D1.1(c)(1) (distributing 150 kilograms or more of cocaine and/or heroin), with a two level enhancement because the offenses occurred near a school, bringing the offense level to 40, pursuant to U.S.S.G. § 2D1.2(a)(1). The defendant also received a three level increase for his management role in the drug organization, which was offset by a three level decrease for his acceptance of responsibility. With a criminal history category of III and a base offense level of 40, the defendant's sentencing range was between 360 months to life imprisonment. However, upon consideration of the government's motion under U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e) based on the defendant's cooperation with the prosecution, Garcia received a 262-month prison sentence, substantially below the applicable sentencing range.

On April 26, 1996, Garcia filed an appeal of his conviction. On June 7, 1996, the United State Court of Appeals for the Third Circuit Court dismissed the appeal as untimely, but referred it to this court to determine whether the notice of appeal would be construed as an application for an extension of time to appeal. On July 17, 1996, this court construed the defendant's April 26 appeal as a motion for extension of time to appeal, and the notice of appeal was deemed timely. On August 12, 1997, the Third Circuit affirmed Garcia's sentence.

On April 4, 2005, Garcia filed the instant motion to modify his term of imprisonment. Garcia seeks a reduction of his sentence pursuant to 18 U.S.C. § 3582(c)(2), based on

Amendment 591 to the U.S.S.G. In its response, the government concedes that amendment 591 operates to reduce the defendant's offense level, but argues that the court should use its discretion to not reduce Garcia's sentence.

II. DISCUSSION

Although courts generally may not modify a sentence imposing imprisonment, 28 U.S.C. § 3582(c) supplies a specific exception to this rule and allows a court to modify a sentence based on a sentencing range that has subsequently been reduced by the Sentencing Commission. 18 U.S.C.§3582(c) provides:

> The court may not modify a term of imprisonment once it has been imposed except that - . . . (2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant . . . the court *may* reduce the term of imprisonment, *after considering the factors set forth in section 3553(a)* to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c) (emphasis added).

A sentencing guideline which is amended after a defendant has been sentenced may be applied retroactively in a § 3582 proceeding if it is given retroactive effect under U.S.S.G. § 1B1.10. *United States v. Benanti*, 137 Fed. Appx. 479, 481 (3d. Cir. 2005). § 1B1.10 is a policy statement that provides guidance to courts reviewing § 3582(c)(2) motions for a reduction in the term of imprisonment as a result of an amended guideline range. §1B1.10 provides:

> (a) Where a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, a reduction in the defendant's term of imprisonment is authorized under 18 U.S.C. § 3582(c)(2). . . .

> (c) Amendments covered by this policy statement are listed in Appendix C as follows: . . . 591, . . .

U.S.S.G. § 1B1.10. Amendment 591, the amendment at issue in this motion, is given retroactive effect because it is explicitly included in subsection (c) of U.S.S.G. § 1B1.10.[3] *Benanti*, 137 Fed. Appx. at 481.

Amendment 591 changed U.S.S.G. §§ 1B1.1, and 1B1.2, the Application Notes to §§ 1B1.2 and 2D1.2, and the Introduction to the Statutory Index (Appendix A). The amendment was "intended to emphasize that the sentencing court must apply the offense guideline referenced in the Statutory Index for the statute of conviction." U.S.S.G. Manual, Supp. To App. C, Amendment 591 (Nov. 1, 2000) at 32. Among other things, the amendment resolved a circuit split regarding the enhancement penalties in § 2D1.2. Prior to the amendment, some courts applied § 2D1.2 only in a case where the defendant was convicted of an offense specifically referenced to that guideline. *See United States v. Locklear*, 24 F.3d 641, 648 (4th Cir. 1994) (finding that § 2D1.2 does not apply to convictions under 21 U.S.C. § 841 because commentary to § 2D1.2 lists only 21 U.S.C. §§ 859, 860, and 861 as the "Statutory Provisions" to which it is applicable). Other courts applied the enhancement in any case where the defendant's relevant conduct included drug sales in a protected location or involving a protected individual, even if not convicted of an offense relating to drug sales in a protected location. *See United States v. Robles*, 814 F. Supp. 1249 (E.D. Pa.), *aff'd* (unpub.), 8 F.3d 814 (3d. Cir. 1993) (looking to

---

[3]The Third Circuit has held that Amendment 591 is retroactive in cases involving an 18 U.S.C. § 3582(c) motion for reduction of sentence, which the Guidelines explicitly authorize in U.S.S.G. § 1B1.10. *United States v. Benanti*, 137 Fed. Appx. 479, 481 (3d Cir. 2005) ("Amendment 591 is given retroactive effect in § 1B1.10, thus a defendant may seek relief pursuant to that amendment").

relevant conduct to determine appropriate guideline). Amendment 591, amends Application Note 1 to § 2D1.2 to make it clear that for the enhancement of an offense level under §2D1.2 to apply, the defendant must be "convicted of a statutory violation of drug trafficking in a protected location or involving an underage or pregnant individual." U.S.S.G. Manual, Supp. To App. C, Amendment 591 (Nov. 1, 2000) at 32.

Here, Garcia pled guilty to possessing cocaine near a school with intent to distribute, under 21 U.S.C. § 860. The commentary to U.S.S.G. § 2D1.2 lists 21 U.S.C. § 860 as one of the "Statutory Provisions" to which it is applicable. Therefore U.S.S.G. § 2D1.2 enhancement does apply to Garcia.

§ 2D1.2 provides that the base offense level from § 2.D1.1 may be enhanced by the greatest of:

> (1) 2 plus the offense level from § 2D1.1 applicable to the quantity of controlled substances directly involving a protected location or an underage or pregnant individual; or
> (2) 1 plus the offense level from § 2D1.1 applicable to the total quantity of controlled substances involved in the offense; or
> (3) . . .

U.S.S.G. § 2D1.2(a).

The indictment, the pre-sentencing report, and the plea agreement do not attribute any drug quantities to defendant's 21 U.S.C. § 860 protected location counts. *See* Indictment, *United States v. Garcia et al*, No. 95-220 (April 26, 1995), Guilty Plea Agreement, *United States v. Garcia*, No. 95-220-02 (E.D. Pa. 1995), Presentence Investigation Report, *Garcia,* No. 95-220-02 (E.D. Pa. 1996). Because no quantity of controlled substances was ascertained as directly involving a protected location, the government has conceded that U.S.S.G. § 2D1.2(a)(1) and its

corresponding two level enhancement do not apply.[4] *See* Government's Resp. 4. Therefore, rather than adding two levels for distribution of drugs in a protected location, as was done in the pre-sentencing report and accepted at Garcia's sentencing hearing without objection, the government has agreed that only one level should be added, as per § 2D1.2(a)(2). *Id.* At sentencing Garcia was given a total offense level of 40, based on a total cocaine quantity in excess of 150 kilograms.[5] Given the defendant's criminal history category of III, his sentencing guideline range was 360 months to life imprisonment prior to any downward departure. Garcia's total offense level is now 39 under the agreed amended guideline, and he would have faced a sentencing guideline range of 324-405 months prior to any downward departure under U.S.S.G. § 5K1.1. Therefore, this court may reduce the defendant's sentence, based on 18 U.S.C. § 3582(c)(2).

Garcia is not entitled to a sentence reduction as a matter of right. 18 U.S.C. § 3582 "permits, but does not require a district court to re-sentence a defendant." *United States v. Brown*, 104 F.3d 1254, 1255 (11th Cir. 1997). If a court has the power to re-sentence a defendant due to an amended sentencing guideline, the court may do so only "after considering the factors set forth in section 3553(a) to the extent that they are applicable." 18 U.S.C. §3582(c)(2). These factors include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to reflect the

---

[4]Whether this is the result of Amendment 591 is somewhat unclear, but because it is clearly a correct interpretation of U.S.S.G. § 2D1.2, I will accept the agreement of the parties.

[5]The defendant stipulated in his plea agreement that he participated in a conspiracy to distribute cocaine or its equivalent in excess of 150 kilograms. Guilty Plea Agreement, *Garcia*, No. 95-220-02 (E.D. Pa. 1995). The defendant's attorney acknowledged this stipulation at the sentencing hearing. Transcript of Sentencing at 19, *Garcia*, No. 95-220-02 (E.D. Pa. 1996).

seriousness of the offense, to promote adequate deterrence, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational training; (3) the kinds of sentences available; (4) the applicable sentencing range under the guidelines as amended; (5) any pertinent Sentencing Commission policy statement, subject to any amendments; (6) the need to avoid unwarranted sentence disparities among defendants; and (7) the need to provide restitution to victims. 18 U.S.C. § 3553(a).

Although defendant is not entitled to a sentence reduction as a matter of right, in order to assess the impact of the 18 U.S.C. §3553(a) factors, I will schedule a resentencing hearing.

III. CONCLUSION

For the foregoing reasons, I will grant the defendant's motion to modify his sentence and schedule a resentencing hearing. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	CRIMINAL ACTION
	:	
v.	:	No. 95-220-02
	:	
EFRAIN GARCIA	:	
Defendant.	:	

ORDER

And now, this _____ day of October 2005, upon careful consideration of defendant Efrain Garcia's motion to modify his term of imprisonment pursuant to 18 U.S.C. § 3582(c)(2), the government's response and defendant's reply, it is hereby ORDERED that the motion is GRANTED. A resentencing hearing is scheduled for October 25, 2005, at 2:00 pm.

_____
William H. Yohn. Jr., J.